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# DIRECTIONS FOR THE DISPOSITION OF MY VITAL ORGANS

Lloyd R. Cohen\*

## *Directions for the Disposition of My Vital Organs*

*Being of sound mind and body, I, Lloyd Robert Cohen, do hereby declare that in the event of my death, I refuse permission for any of my major organs (i.e., kidneys, heart, liver, lungs, or pancreas) to be harvested from my body unless and until at least one of the two following conditions is satisfied:*

- 1. that the harvested organ be designated for transplantation into my direct descendent, wife, mother, aunt, first cousin, or any of their descendents or,*
- 2. that all costs attendant to the preservation of my body and the harvesting of my organs be paid by a third party and:*
  - a. that the sum of at least \$864.27 be paid to my estate in exchange for each organ, or,*
  - b. that the harvested organs be designated for transplantation into a member in good-standing of LifeSharers list entitled to receive the organ.<sup>1</sup>*

*Should any member of my family, in contravention to the wishes expressed in this document, permit transplantation of any of my major organs, the amount that he or she would otherwise inherit from my estate by devise or intestacy shall be reduced by \$50,000.<sup>2</sup>*

Well, there you have it. Given the lack of need by any member of my family and the small number of people currently enrolled on the LifeSharers's list, my organs will almost certainly go to waste unless my estate gets paid. Why did I choose the odd price of \$864.27? I simply require that some real and substantial payment be made and am not overly concerned about the exact amount. To serve my politi-

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1. LifeSharers describes itself as "a non-profit voluntary network of organ donors. LifeSharers members promise to donate upon their death, and they give fellow members first access to their organs." Lifesharers.com, <http://lifesharers.com/> (last visited Jan. 7, 2006). For a fuller explanation of LifeSharers, see David J. Undis, *Changing Organ Allocation Will Increase Organ Supply*, 55 DEPAUL L. REV. 889 (2006).

2. Signed copies of this document have been delivered to my family and the *DePaul Law Review*.

cal goals, it is merely necessary that some financial payment be permitted, and a broad range of prices would be equally felicitous of increasing supply. Therefore, I chose a number that in some sense is arbitrary and capricious. Feel free to choose a different one for yourself. That said, I think \$864.27 has some appeal. It seems a modest enough request for an irreplaceable life-saving organ—just enough for a nice but not extravagant party celebrating my life. In addition, it represents roughly one percent of the initial cost of a renal transplant and considerably less than that for the other organ grafts.<sup>3</sup> I ask for a sum that will strain the budget of hardly any recipient—certainly no one who can afford the other ninety-nine percent or more of the transplant expenses. In those few instances when it would pose a financial strain for sick and dying people, I would hope those who express such great concern for the suffering inflicted by organ failure will put their money where their mouths are by picking up the tab, and in that way dispel any suspicion that their claims are merely self-serving pretense.

Ask no more of me and my family. You will be catching us at a particularly inopportune moment—I will have just lost my life. My death will have been sudden and unexpected, otherwise most of my organs would prove useless for transplantation. My family will have suffered the terrible shock of having a husband and father ripped from their lives. You are being offered the indispensable component in organ transplantation at an exceedingly modest price—a world-beater of a bargain if ever there was one.

While I am not trying to be flippant, perhaps I miscalculate. Would it overwhelm the capacity of private donations if everyone similarly situated were to ask for the same payment for their organs? A few simple calculations dispel this fear. It appears that the number of suitable organ donors is less than 25,000 annually.<sup>4</sup> If each donor were to

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3. Transplant Living, Financing a Transplant, <http://www.transplantliving.org/beforethetransplant/finance/costs.aspx> (last visited Mar. 29, 2006).

4. Such estimates are hardly the stuff of hard science. Over the years a variety of researchers have derived a plethora of estimates of potentially suitable donors. See, e.g., S. REP. NO. 98-382, at 2 (1984), as reprinted in 1984 U.S.C.A.N. 3975, 3976; RUSSELL SCOTT, *THE BODY AS PROPERTY* 83 (1981); Clive O. Callender, *Legal and Ethical Issues Surrounding Transplantation: The Transplant Team Perspective*, in HUMAN ORGAN TRANSPLANTATION: SOCIETAL, MEDICAL-LEGAL, REGULATORY, AND REIMBURSEMENT ISSUES 42, 43-46 (Dale H. Cowan et al. eds., 1987); Theodore Cooper, *Survey of Development, Current Status and Future Prospects for Organ Transplantation*, in HUMAN ORGAN TRANSPLANTATION: SOCIETAL, MEDICAL-LEGAL, REGULATORY, AND REIMBURSEMENT ISSUES, *supra*, at 22-23. Note also that the clinical criteria for organ suitability differ from organ to organ and are more restrictive for the heart than for other major organs, such as kidneys. Hence a somewhat smaller proportion of hearts will be salvageable

provide four organs,<sup>5</sup> that amounts to about 100,000 organs annually. At \$864.27 per organ, the net result would be \$86,427,000 a year. I imagine private donors could easily pick up any residual tab that lies beyond the means of recipients and their families. American individuals, estates, foundations, and corporations gave more than \$240 billion to charities in 2003, and more than \$20 billion of this amount went to health organizations.<sup>6</sup> If I am in error on that score, surely that amount can be found in government budgets to save the lives and health of 100,000 people, considering that the enhanced organ availability would likely yield a more than compensatory savings elsewhere in governmental health budgets.<sup>7</sup>

## II. WHY?

What is the point of these *Directions for the Disposition of My Vital Organs*? Surely my family is not so impecunious; given that the payment I require is illegal in nearly every jurisdiction, it is doubtful that the conditions will be satisfied. Nor am I so egotistical that I think my wishes regarding the disposition of my remains are a worthy matter for the *DePaul Law Review* to memorialize in its pages. Why then,

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than of livers or kidneys. See Russel W. Evans et al., *Donor Availability as the Primary Determinant of the Future of Heart Transplantation*, 255 JAMA 1892, 1894 (1986).

5. This is an optimistic supposition. Statistics for the last couple of years indicate a yield of about 3.16 organs per deceased donor. See U.S. ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK & THE SCIENTIFIC REGISTRY OF TRANSPLANT RECIPIENTS, 2003 OPTN/SRTR ANNUAL REPORT, available at <http://www.optn.org/AR2004/default.htm> (last visited Mar. 10, 2006).

6. See American Association of Fundraising Counsel, 2003 by Type of Recipient Organization, <http://www.google.com/search?q=cache:21HfjUhaYVYJ:aafrc.org/aboutaafrc/bytypeof67.html/> (last visited Jan. 24, 2006).

7. Estimating the magnitude of the cost savings is difficult and subject to significant changes with medical advances. The entire End Stage Renal Disease Program has a total cost for both transplantation and dialysis of approximately \$2.8 billion per year and is therefore the upper limit to any potential cost saving. Paul W. Eggers, *Analyzing the Cost Effectiveness of Kidney Transplantation*, in PROCEEDINGS OF THE 19TH NATIONAL MEETING OF THE PUBLIC HEALTH CONFERENCE ON RECORDS AND STATISTICS (1983), available at [www.cdc.gov/nchs/data/phcrs/phcrs83.pdf](http://www.cdc.gov/nchs/data/phcrs/phcrs83.pdf). In 1978, Stange and Sumner estimated that, over a ten-year period, providing kidney transplants to one thousand patients who would otherwise be on facility dialysis would result in a cost savings of between \$279 and \$300 million. Paul V. Stange & Andrew T. Sumner, *Predicting Treatment Costs and Life Expectancy for End-Stage Renal Disease*, 298 NEW ENG. J. MED. 372, 375 (1978). See also SCOTT, *supra* note 4, at 55–56, 73. More recently the Department of Health and Human Services (HHS) has estimated a cost saving from cadaver transplants compared to dialysis of \$62,000 per patient over a five-year period. OFFICE OF INSPECTOR GENERAL, DEP'T HEALTH & HUMAN SERVS., THE ACCESS OF FOREIGN NATIONALS TO U.S. CADAVER ORGANS 10 (1986). Eggers has estimated a much more modest cost savings of perhaps several million dollars per thousand patients over a five-year span. Eggers, *supra*, at 218; see also LLOYD R. COHEN, INCREASING THE SUPPLY OF TRANSPLANT ORGANS: THE VIRTUES OF AN OPTIONS MARKET 100–02 (1995).

after fruitless years urging reform that would increase the supply of organs, do I now withhold my organs from transplantation?

Though Tom Peters and David Kaserman<sup>8</sup> (two other presenters at this Symposium) have made worthy efforts, there is really very little to add regarding the virtues of employing a market incentive to increase organ donation. The proposals are varied and nuanced. The arguments in favor are simple, clear, and overwhelming. The arguments in opposition are muddled, weak, and fatuous. So the question arises: Why has there been so little progress toward increasing organ supplies? Why, despite more than fifteen years of effort, do we still live under a regime that condemns people to death and suffering while the organs that could restore them to health are instead fed to worms? What more can we do to create an effective system of incentives that will end this tragedy?

The core of the various market-based reform proposals seems so obvious and incontrovertible as to be banal—the principle reason that we manage to recover perhaps half the transplantable organs potentially available from cadavers is that those who are asked to donate receive nothing in return. A significantly larger organ supply would become available if donors were offered at least a token material reward (in view both of the benefit to the recipient and the other costs entailed by a transplant operation, \$864.27 easily qualifies for the label “token reward”). I feel a bit ridiculous in having earned some renown by championing a proposal based on such a trivially obvious proposition.

Self-interest harnessing reform proposals have circulated for more than two decades, with new variations regularly offered to meet the unending stream of ill-founded objections. The proposals feature numerous subtle and not-so-subtle differences in the form and path of compensation. Some are directed at the next of kin and would offer compensation for surrendering organs of the deceased. Others would offer compensation to the living person for a pledge to donate his or her organs at death. Among the latter proposals, compensation can come in one of three generic forms—compensate the donor's estate or designee after the organs are harvested; compensate the donor financially at the time his or her pledge is made (perhaps a reduction in health insurance premiums); or compensate him or her in kind by offering priority to organs if he or she requires a transplant.

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8. T. Randolph Beard & David L. Kaserman, *On the Ethics of Paying Organ Donors: An Economics Perspective*, 55 DEPAUL L. REV. 827 (2006).

I entered this arena sixteen years ago, proposing an options or futures market as the best device for alleviating the shortage and relieving suffering. In such a market, healthy people would be offered the opportunity to give an "option" on their transplantable organs to be recovered at their death. If they die under appropriate conditions and their organs are recovered, a previously determined sum of money would be paid to their estate or designee. In earlier writings I suggested the sum of \$5,000 for each major organ. Over the years, I have written a book and perhaps a dozen articles promoting that program, and I have spoken before a variety of bodies, including the plenary session of the World Transplant Congress and the Joint Meeting of the Annual Conference of U.S. Transplant Surgeons and Physicians.<sup>9</sup> I have appeared on *Sixty Minutes*, the BBC, Australian television, and too many other television and radio shows to remember. Oh yes, and I even met individually with senior aides to perhaps half a dozen Senators. And what has been the outcome of all of this? Aside from a wonderful trip to Paris for my family in 1992, nothing. And it is not

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9. COHEN, *supra* note 7; Lloyd R. Cohen & Melisa Michelsen, *The Efficiency / Equity Puzzle and the Race Issue in Kidney Allocation: A Reply to Ayres, et al. and UNOS*, 4 ANN. REV. L. & ETHICS 137 (1996); Lloyd R. Cohen, *An Options Market in Cadaveric Organs: A Response to My Fans and Critics, Money for Transplantable Organs: An Idea Whose Time Has Come?* (Apr. 24, 1996), in 2 BIO LAW, July 1996, at S:101 [hereinafter Cohen, *An Options Market*]; L.R. Cohen, *A Futures Market in Cadaveric Organs: Would It Work?*, 25 TRANSPLANTATION PROC. 60 (1993); Lloyd R. Cohen, *The Right of Healthy People to Contract for the Sale of Their Organs Post Mortem*, 8 TRANSPLANTATION & IMMUNOLOGY LETTER 8 (1992); L.R. Cohen, *The Ethical Virtues of a Futures Market in Cadaveric Organs*, in ORGAN REPLACEMENT THERAPY: ETHICS, JUSTICE COMMERCE 302 (W. Land & J.B. Dossetor eds., 1991); Lloyd R. Cohen, *A Market Proposal for Increasing the Supply of Cadaveric Organs*, 5 CLINICAL TRANSPLANTATION 467 (1991); Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989).

I have presented my proposals in the following academic and professional forums, among other occasions. Lloyd R. Cohen, *Increasing the Supply, Improving the Allocation, and Furthering Justice and Decency in Organ Acquisition and Allocation: The Many Virtues of Markets*, Presentation at the Twenty-Third Annual Scientific Meeting of the American Society of Transplant Surgeons (May 14–16, 1997), in 1 GRAFT 1222 (July–Aug. 1998); Lloyd R. Cohen, *Panelist, Money for Transplantable Organs: An Idea Whose Time Has Come?*, The Medical Center Hour, Univ. of Va. (Apr. 24, 1996); Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of an Options Market, Mandated Choice and Financial Incentives*, Annual Meeting of the HHS Division of Transplantation Annual Meeting (1996); Lloyd R. Cohen, *A Market Proposal to Improve Organ Availability*, Simposio Internacional: Transplantes Hoy y Mañana (1994); Lloyd R. Cohen, *A Futures Market in Cadaveric Organs: Would It Work?*, Plenary Session Debate of the 14th International Congress of the Transplantation Society (1992); Lloyd R. Cohen, *Panelist, The Organ Donor Shortage: Innovative Strategies—Possible Solutions?*, Joint American Society of Transplant Physicians and American Society of Transplant Surgeons Scientific Symposium (May 29, 1991); L.R. Cohen, *The Ethical Virtues of a Futures Market in Cadaveric Organs*, First Joint Meeting of the European Society for Organ Transplantation & European Renal Association on Ethics, Justice and Commerce in Organ Replacement Therapy (Dec. 11–14, 1990).

merely that there has been no political support for the market I proposed; there has been no progress for *any* market.

While I and most who wish to marshal self-interest in the cause of increasing the supply of transplant organs have our own favorite solutions, we tend to be ecumenical in our efforts. For example, while I still think that an options market is the best solution, I have added my name and support to my co-panelist David Undis's LifeSharers program. He has been broad-minded as well. Both of us, along with Tom Peters and David Kaserman, are members and supporters of the Ad Hoc Committee for Solving the Intractable Organ Shortage (AHCSIOS), which was organized by Harold Kyriazi, a scientist at the University of Pittsburgh.<sup>10</sup> AHCSIOS is trying to promote a "rewarded gifting" proposal that would offer remuneration to next of kin in exchange for a right to harvest organs from a deceased loved one.<sup>11</sup>

Unfortunately, and with all due respect to and support for David Undis, Tom Peters, David Kaserman, and Harold Kyriazi, I see no progress and am not optimistic for the near future. The question I thus return to is: Why have we been so unsuccessful for so long? How can it be that the shameful system under which so many needlessly suffer and die continues in place without the slightest indication that it is withering and tottering under our assault?

Now, it may seem the height of arrogance and immature petulance on my part to think that I must get my way in this matter. I know I take the risk of presenting myself as the very embodiment of self-centeredness in assuming the world is bad and wrong and I am good and right. But give me a moment and I will make an effort to persuade you that indeed it is foolishness, cowardice, and evil that bar the path, rather than some unrecognized blunder or failing in our proposals.

Before we reach the conclusion that it is the venality and stupidity of others that bars the path, the principle of Occam's Razor demands that we dispose of more mundane and banal explanations. So, I will demonstrate that the conventional explanations all fail.

### III. IMPRACTICAL?

The first objection to these various proposals that must be overcome is that they would not succeed; people would not provide more organs in response to a financial incentive.

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10. See Ad Hoc Committee for Solving the Intractable Organ Shortage (AHCSIOS), <http://www.ahcsios.org> (last visited Dec. 22, 2005).

11. See *id.*

First, we should note that the epistemological burden our opponents must carry on this question is a heavy one—they cannot merely argue that a market *might* not be successful, or even that it *probably* would not work. For given the enormous gain in lives saved and suffering ameliorated if a market were successful, unless they could establish that there is some great cost to trying and failing, their argument must be that the market is almost certain to fail.

Sometimes I have heard this objection framed in the form of the assertion that our proposals are without empirical support. Surely there is some cynicism in this accusation. The obvious and perhaps only way to resolve the empirical question is through a market test. Let us try one or several of these market proposals somewhere for a few years and see if it works. But of course we cannot try it because such a market is illegal and would require us to enact a limited repeal of the law. But opponents argue that we must not repeal the law until we have empirical support.

When I first heard the demand for empirical support and the claim that a market solution would not be successful, I was frankly caught off-guard. In my first articles on this subject, I thought the practical virtues of a market were so apparent as not to deserve extensive discussion. It did not occur to me that there would be a serious question raised about whether a market would increase organ retrieval.

Given that market rewards are almost always the most effective incentive for eliciting the provision of goods and services, there is a heavy presumption in favor of a market. It is then incumbent on the opponents to rebut this presumption. They must provide persuasive arguments why in *this market*, unlike virtually all others, permitting the price to rise above zero will not increase the quantity supplied. I cannot imagine what sensible argument they might offer. There is, after all, nothing very economically peculiar in the proposition that if we offer people a fairly substantial amount of money for something that is of virtually no value to them (a cadaveric organ), more of them will surrender it. Notwithstanding that the burden is not mine but my opponents, I will offer a few arguments on the efficacy of a market. First, let me reiterate that the mere possibility a market might not increase supply is never a sound argument for prohibiting it. If we are to prohibit it, we should do so because a market presents some substantial downside, such as the risk that it might decrease the current supply. Is there such a risk?

Some critics assert that a market might dissuade donation. Their fear is not totally baseless. Some markets, such as “rewarded gifting” payments to next of kin, could *conceivably* discourage some people



from donating. Next of kin have custody, not ownership, of the decedent's body. Regardless of whether you or I believe that next of kin have a moral right to profit from their decision as to the body's disposal, *they* may believe that they have no such right. Many next of kin might therefore be disinclined to accept payment. At the same time, if money were offered for agreeing to donate, some next of kin might feel foolish donating and not receiving payment. So, it is at least conceivable that some families who now donate would decline to do so in a world of rewarded gifting. On the other side, however, there is the far more powerful tendency towards increased donation by those not dominated by such moral squeamishness or those simply willing to decline payment when offered and donate nonetheless. But I could be wrong. In the end, it is an empirical question and thus leaves open the possibility of a net reduction in organ retrieval. But this far-fetched, disincentive effect only applies to the behavior of next of kin, and next of kin play no decisionmaking role in an options market. I have heard no sensible reason why anyone who would now sign an organ donor card would decline to do so if informed that he or she could also specify a designee of his or her choice—which of course could be a charity—that would receive a substantial sum of money as a consequence.<sup>12</sup>

Even if an organ market can do no harm in the sense of reducing supply, what further arguments can I offer that it will increase supply? While each culture is different, we can draw some inferences from various organ markets elsewhere in the world. I hesitate to compare a market in cadaveric organs with a market in organs from living donors. Clearly the sacrifice on the part of the vendor is incomparably greater if the organ is to be taken when the vendor is alive. But, if

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12. Some have claimed that such financial incentives would discourage altruistic giving by next of kin. See Margaret M. Byrne & Peter Thompson, *A Positive Analysis of Financial Incentives for Cadaveric Organ Donation*, 20 J. HEALTH ECON. 69 (2001). Byrne and Thompson stated in their abstract that "[w]e show that under current practice and current law . . . inducements to donate organs . . . may lead to a decline in the supply of organs." *Id.* at 69. But the writers actually showed the following: (1) when people choose not to register as donors, the donation decision is made by surviving family members, *id.* at 72; (2) incentives to register as a donor are likely to create a somewhat stronger negative implication that nonregistrants did not want to be donors, *id.* at 74; and thus (3) while incentives would increase initial registrants, they would also decrease family-decided donations from nonregistrants. See *id.* at 72-73. Without any further analysis of effects, the authors concluded that "[t]he latter effect may outweigh the former, yielding a perverse supply response." *Id.* at 78. That single sentence is the sole theoretical basis for stating so boldly in the abstract that incentives may lead to a decline in organs. In my view this is thoroughly fanciful. It represents the kind of "theoretical" analysis in which one shows two theoretical effects in opposite directions and remains agnostic as to which is stronger. As between the direct financial incentive to the donor and the attenuated, hypothesized, negative inference that next of kin might draw, I think there is no contest.

there is a thriving market in organs from living donors in India, Turkey, and various other countries, then it certainly bodes well for a market in cadaveric organs.

The very reason our opponents have such faith in altruism provides further support for the efficacy of a market. They believe altruism should work because transplant organs are of no value to the dead and of enormous value to the ill. Whatever this vast disparity should say about the power of altruism, it speaks volumes in the world of markets. Markets are most effective at transferring goods from low-valued uses to high-valued ones. I can think of no object that fits this category better than a cadaveric organ.

Can we learn anything from the limited American market in cadaveric organs? In our market, it is illegal to buy and sell organs, but it is legal—indeed encouraged—to donate them. At the zero price currently paid to organ donors, we have a substantial but far less than satisfactory amount of organ donation. While the rate of donation has not been allowed to vary with price, it has varied depending on whether, and how, people are asked to donate. Many potential donors who would otherwise decline to donate can be badgered, bullied, embarrassed, cajoled, and perhaps even persuaded into donating. Thus, it is fair to infer that potential donors will also respond to more substantial financial incentives.

A second use of the limited observation we have of the supply curve provided by the current zero-price market requires a thought experiment. Imagine that the price of organs is not raised above zero, as I propose, but *lowered* instead. Despite our great respect for the generosity of those people who currently donate, is there any doubt that if donors were *charged* a mere \$500 fee for each organ they donate, most of the current supply would dry up? So, if on one side of the current zero price supply is highly responsive to price, is there a good reason to think that on the other side of a zero price supply is totally unresponsive?

Ultimately I believe that virtually any of the proposed markets will be a resounding success because those who refuse to donate do not have a *strong* objection to having their organs harvested. Under the present regime donors are being asked to assume some real, albeit limited, psychic costs without being offered *any* compensating benefit. The simplest, most direct, most efficient, and least expensive way to induce them to make the sacrifice is to compensate them. For those who remain skeptical there is only one piece of evidence that will persuade: try it and see.

Perhaps I should have anticipated the objection that a market would be ineffective. The prospect of an effective organ market places our opponents in a terrible bind. A market that would recover the many vital organs that are currently buried and burned would be the salvation of thousands of innocent patients who now must suffer and die. What great moral principle condemns such a beneficent market? Against the saving of innocent lives, poetic statements about the dignity of human life being degraded by commercialism would be revealed as the empty moral pieties of armchair philosophers incapable of a reasonable balancing of human needs. Our critics would therefore prefer to believe a market would not work and to take the unjustified, epistemic position that we must prove that it will.

#### IV. SHALLOW?

At times our opponents cast their objection to financial incentives in terms of the shallowness of a market. They are right; a market is a shallow solution. Its efficacy does not rest on some profound understanding of the human spirit. The deceit of the critics is that depth is to be prized in all things and shallowness disdained. They are wrong, and I think in their heart of hearts they know it. Weighty tones and dewy eyes are not substitutes for good reasons. The tool we bring to bear, economics, is a shallow one. But that is in fact its virtue. Our opponents make a simple error—they assert a truism and follow it with a non sequitur. The truism is (and here I quote myself):

The human body is a peculiar thing. At the moment of death it is transformed from the exalted state of the corporeal incarnation of the human spirit to the irreversible status of a cadaver. It is understandably difficult for people to immediately recognize and accept such an awesome transformation.<sup>13</sup>

The non sequitur is that because feelings about the human body and its meanings, alive or dead, have a root deep in human consciousness, we therefore cannot motivate people's behavior with regard to it by something as base as financial reward.

In simultaneously having deep meanings and being subject to base economic force, transplant organs are not unique; indeed, they are not even very special. Consider human waste. Human beings have a deep-rooted and not fully rational antipathy to excrement. Despite the deep root of this antipathy, you can, for a reasonable sum of money, hire people to empty your septic tank. And, we would think it most odd were an ethicist—medical or otherwise—to suggest that be-

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13. COHEN, *supra* note 7, at 17.

cause the antipathy to excrement has its root deep in human consciousness we must terminate all paid drainage of septic tanks and instead rely on altruism to provide this service. The same is true of transplant organs. Yes, our approach is shallow. There is neither necessity nor virtue in delving deep into man's consciousness to find and change the root cause of uneasiness about organ donation. Offer compensation, people will sell their organs, and lives will be saved.

#### V. IDEOLOGICALLY DRIVEN? THE POT IS CALLING THE KETTLE BLACK

Other opponents accuse us of being ideologically driven. This reminds me of the saying that he who sees fault in his neighbor would do better to cast his glance upon himself. Proponents of financial incentives design their proposals to be as ideologically uncontroversial as possible. Though I am a libertarian, my goal in formulating my options market proposal was to increase the supply of organs, not liberty. Indeed, I sacrificed liberty to achieve political acceptability. How so? Some are concerned that the poor will be coerced to sacrifice too much, so my options market does not permit it. Others are concerned that the rich will acquire organs ahead of the poor, so my market does not allow it. I am concerned that mothers not be asked to traffic in their dead child's flesh, so my market does not entail it.

To the extent ideology is evident in any of these market-oriented proposals, it is the ideology that the laws of human motivation have a general application. That is, we believe that self-interest is a powerful motivation and, therefore, supply is responsive to price. But such a belief is as grounded in observation and rational thought as the belief that the earth revolves around the sun. A critic who labels a proposal based on either of these beliefs as "ideologically driven" reveals more about himself or herself than the proposal he or she is criticizing.

So where is the ideology? It is not with us but with our opponents. Their ideology is that charity is a great virtue, and those who agree to donate their organs to help others have done a great and noble act. And if donation is a virtue, then a refusal to donate is a vice, and any system within which people are rewarded (through financial or other incentives) for their refusal to make a gratuitous donation is doubly wicked.

This ideology is at its core false and repugnant. For the same logic (donation is a virtue, refusal to donate a vice) can be applied to *any* exchange of goods or services. Is it wicked for my neighbor to hold a garage sale, when she could easily and virtuously donate her unwanted possessions? Is it evil for a professor to charge for his ser-

vices, when he could offer them for free? And is it doubly wicked that the law permits such transactions?

The belief that markets are an immoral alternative to virtuous donation is antithetical to the 250 years of political and philosophical thought on which this country is based. And yet it is this ideology that is again and again apparent in the writings and statements of our critics. Our opponents are so driven by a loathing of markets that no market, however many compromises it incorporates to answer wealth-based or other ethical objections, can ever satisfy them. They simply cannot abide the notion that even with regard to cadaveric organs—which, after all, are a uniquely human gift of enormous value to the recipient, and valueless to the decedent—altruism should prove clearly inferior to self-interest as a motivation to donation. Driven by this fanatical ideology, they would sacrifice the lives of thousands of sick patients.

## VI. PIOUS, EMPTY MORALISMS

Finally, when all the practical arguments are answered, we get into the true currency of the “ethicists” who oppose us—pious, intellectually empty moralisms.

Consider the following typical argument, offered by Dr. B. Freedman, against permitting a market in organs:

That which cannot be sought and sold is by definition priceless. By removing human life and health from the marketplace, we affirm this principle which underlies much contemporary thinking about ethics: the intrinsic, ineliminable, ineluctable value of human life and health. This affirmation is itself a process which can and should be constantly repeated without ever exhausting its point.<sup>14</sup>

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14. B. Freedman, *The Ethical Continuity of Transplantation*, 17 *TRANSPLANTATION PROC.* 17, 23 (Supp. IV 1985).

These elaborate, hyper-sophisticated, and deeply evocative arguments praising donation and decrying the sale of tissue and organs are common in the literature. Professor Peter Singer raised a similar argument with regard to sale of blood almost thirty years ago:

If Blood is a commodity with a price, to give blood means merely to save someone money. Blood has a cash value of a certain number of dollars, and the importance of the gift will vary with the wealth of the recipient. If blood cannot be bought, however, the gift's value depends upon the need of the recipient.

Peter Singer, *Rights and the Market*, in *JUSTICE AND ECONOMIC DISTRIBUTION* 207, 213 (John Arthur & William Shaw eds., 1978).

Professor Singer's argument seems particularly bizarre and cruel. He is correct in asserting that if the recipient is not permitted to purchase the organ—for no one is permitted to sell it—then the value of the gift to the recipient becomes greater. Ironically, this is precisely because the thing being given is worth less to the donor, indeed it becomes worthless. Donation of that which you cannot use and may not sell is hardly a noble or even a particularly generous act. Professor Singer sees some aesthetic or moral virtue in leaving the potential recipient with so few options that he is desperately grateful for the gift.

Despite Dr. Freedman's eloquence and evocative power, I confess I am unable to decipher this passage sufficiently to reach a comprehensible core. What does it mean to say that life and health are priceless? Does the author mean that they are of a nature that they literally cannot be bought and sold? If life and health are priceless in that sense, then something very peculiar is going on when people shop for medical services, drugs, and equipment. Most of us believe that the medical goods and services we purchase will, on balance, improve our health and extend our lives. Are we mistaken? I think not. Dr. Freedman must mean something else when he says life and health "cannot be bought and sold."

Perhaps Dr. Freedman means that life and health *should not* be priced rather than that they *cannot* be priced—that life and health should not have their sacred spiritual character soiled by contact with the profane market. But if that is his position, then why does he not follow the argument to its logical conclusion? Why does he limit his concern to transplant organs? After all, transplant organs are but the tiniest fraction of the vast range of goods and services that extend life and restore health. Why does he refrain from arguing for outlawing the remuneration of physicians, nurses, pharmacists, hospitals, and the like? After all, the life and health of the sick and injured depends on the service of these people. Does it not profane life itself that medical practitioners are routinely paid for their services? In the transplant procedure in particular, the physicians are paid, the surgeons are paid, the nurses are paid, the hospitals are paid, the drug companies are paid, and so on. Indeed, everyone is paid except the supplier of the single irreplaceable input.

On the other hand, perhaps Dr. Freedman does not mean that life and health cannot be priced or should not be priced, but rather that they are priceless in the sense of being of infinite value. If so, then his position on paying for organs is a complete non sequitur. Indeed, the logic of his position is that we should spare no expense in our willingness to acquire organs for transplantation; we should be willing to pay small fortunes for an additional organ. Further, if life and health are of infinite value then logic would seem to demand that all things of finite value should give way in the face of preserving life and restoring health. I am surprised that he does not argue for a prohibition of all discretionary spending not related to the preservation of life and health so that all of society's resources could be directed to that singular and incomparably important goal. And how does one choose between lives—for example, life support for the elderly and infirmed, or prenatal care?

The quotation from Dr. Freedman is one of a class of objections to markets that bear the infelicitous name of "commodification."<sup>15</sup> Let us examine this class more closely to see if it has any sensible application to an organ market.

Those who use the term commodification suggest that every exchange, or attempt at exchange, of goods and services across a market is of necessity also a species of communication—the exchange conveys information or a view of the world. If nothing else, the attempt to exchange a good or service across a market suggests that such an exchange is possible—that the good or service in question retains its character or value despite being transferred for cash in a market. While this assertion would seem innocent enough with respect to most goods or services (food, clothes, haircuts), it is at least suspect with respect to some (friendship, love).

The next step in the anticommodification argument is to posit that the communication made in a particular case is somehow harmful or untruthful. It may be harmful to the parties conducting the transaction or to third parties. And so, in order to prevent this harm, the anticommodifiers would ban such transactions in order to eliminate such communication.

Let us move beyond these generalities to illustrative examples. I concur with the anticommodifiers that attempting to sell or buy certain services conveys a message that transforms, diminishes, or destroys the value of those services. For example, if this evening you wished to make love to your wife and she were disinclined, were you to offer her cash remuneration for her acquiescence, it is hardly likely to improve your marriage—or your sex life. It is generally recognized that sexual union between loving spouses precludes the exchange of money. To offer payment for the act would imply a spiritual distance inconsistent with the marital bond, thereby destroying the meaning your wife attaches to the act. Another example that I recall from my youth is a child saying, "If you share your potato chips with me, I'll be your best friend." The instinctive and correct reaction to such an offer is that friendship is not the sort of thing that can be bought, and offering to sell it makes it apparent that it is not there to be purchased.

The existence of such value transforming exchanges is quite interesting from the perspective of economics, philosophy, and psychology. But what connection does this have to public policy? And what possi-

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15. The term was popularized in the legal literature, and many of the arguments are listed and discussed in Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). The term "commodification" connotes that the selling of something that should not be sold mistakenly turns it into a commodity.

ble connection could it have to organ procurement policy? I think the answer to the first question is none, and to the second, a fortiori, none.

Anticommodification is fundamentally an argument against communication. That is, those who object to organ sales, or any other act on this ground, are in effect saying "it sends a bad message" and so should not be permitted. Even when the message truly is bad, and even if there were a practical benefit to silencing it—which I will argue below there is not—Americans in particular should be loath to follow such a path. It is offensive to our legal and constitutional heritage, for we are a nation that honors freedom of speech. We are all entitled to voice our opinions no matter how mistaken, loony, hateful, or pernicious they may be. If the worst that can be said against an organ market is that it sends the wrong message, then we need not even question the accuracy of that assertion or balance the benefits that a market would offer. Sending messages, whether correct or false, is privileged in our country.

Returning to Dr. Freedman's quotation, we see that he apparently believes that there is some morally compelling message delivered in the refusal to either accept or offer payment for a transplant organ, and perhaps other medical goods and services as well. I accept not only his right to his opinion, but also his right to sacrifice his wealth, and even his health, to deliver that message by refusing to commercialize that aspect of his life. What is offensive to our American tradition is that he, and others who echo his argument, have made it a crime for anyone who does not share their beliefs to deliver a different message through their actions.

But much more can be said against commodification than merely that it offends our traditions of free speech and personal liberty. Whatever intellectual interest there is in the notion that the willingness to engage in an exchange conveys information of what one values, it is hard to imagine any natural and necessary public policy implications of this. Returning to my earlier examples, prohibiting the exchange of money for sex between spouses or the exchange of friendship for potato chips would be like killing the bearer of bad tidings. You and your wife exchanging money for sex is merely the outward manifestation of the degraded spiritual character of your marriage. That spiritual character will not be elevated by prohibiting this transaction. Therefore, it is difficult to see why any third party, to say nothing of the state, should object and seek to prohibit such transactions. Similarly, suppose that Dr. Freedman is correct in his objections to an organ market, and that those who would either buy or sell organs are depraved. Do they become any less depraved if the only reason that



they do not engage in this commerce is because it is illegal and they fear punishment?

Dr. Freedman and the anticommodifiers would argue in response that there is something akin to what economists call an externality at play. Returning again to my earlier examples, they would argue that the demonstration of the vacuous character of your marriage is a virus that might infect my marriage. What if they are correct? It is difficult to see how outlawing the exchange of sex for money between spouses would have any but a trivial effect on arresting the spread of loveless marriages. The loveless marriage will give evidence of itself in a thousand other, more visible ways. Similarly, it would hardly make sense to outlaw the exchange of potato chips for friendship in the hope that we would then get more friendship; we would only get less obvious evidence of false offers of friendship. Returning to Dr. Freedman again, does he perhaps believe that the depravity displayed by selling or buying organs is catching? At the very least, he seems to ascribe far too much influence to one minor market. Moreover, the alternative view, that virtue is its own reward and serves as a beacon to others, seems compelling. In other words, if selling one's organs is a degrading act, then permitting a market would give a demonstration of the degraded character of those who would participate in it and the exalted character of those who would not.

Even if a compelling case could be made for prohibiting the sale of sex between spouses, or some other service, the underlying moral objection—that one may not sell what cannot be sold because the effort to do so conveys a stance towards the exchange that diminishes the value of that which is exchanged—has no application to the exchange of goods, and certainly has no application to an organ market. The sort of goods, or rather services, that generates this value-transforming effect when sold do so because the service is meant to establish, cement, or signify a particular relationship, such as that of friends or lovers. The service can only provide that function if transferred in a donative fashion. Exchanging it for money would be inconsistent with the posited and desired relationship.

But this argument is completely inapposite to the transfer of organs. A transplant organ is not a relationship, and is not degraded by a market transfer. Indeed, a strong case can be made that a cash transfer increases the value of that which is exchanged. Recipients of transplant organs are generally not much interested in entering an emotional relationship with the donor. They are largely indifferent to the inner spiritual stance of the donor. They want the organ and little else.

Transplant organs harvested from cadavers are not the only human tissue transferred between individuals. In the case of other human tissue, rather than destroying or diminishing the value of what is offered, the vendor who sells the tissue for cash generally provides the purchaser with something more valuable than the altruistic donor precisely because the vendor demands cash payment. In the case of sperm donation or surrogate motherhood, typically the last thing the recipient wants is an emotional attachment from the donor. Thus, the cash arrangement serves the wishes of the recipient because those who provide sperm for cash are less likely to have as strong an interest in what becomes of the offspring they sire. The surrogate motherhood phenomenon provides an even more dramatic illustration. Couples who wish to employ a surrogate mother generally want a woman who will assure the delivery of a healthy baby and then disappear. What they most fear is the woman who will change her mind and keep or abort the baby. Of all the motivations that might enter the calculus of a potential surrogate, financial gain will usually be the most reassuring to the couple on the other side of the transaction. Similarly, in live kidney transplants, psychological examination of the donor is required to weed out those who wish to donate for reasons that portend future difficulties for the donor or his or her relationship to the recipient.<sup>16</sup> Selling your kidney rather than donating it out of love, guilt, or the desire to inspire guilt, will be less problematic for the recipient.

But what of the effect on the community? While this absence of charity may be unimportant to the purchaser of the organ, some commentators argue it is of significance to the wider society.<sup>17</sup> Here, I am addressing not the practical objections that fewer organs will be retrieved or that they will cost more, but only the moral or social argument that charity should be encouraged, and that a market would either partially displace, completely eliminate, or change the nature of charity in this sphere of life. Why is the reduction in charity not a cause for concern?

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16. See RENÉE C. FOX & JUDITH P. SWAZEY, *THE COURAGE TO FAIL* 25–27 (2d ed., rev. 1978).

17. A concern with fostering altruism apparently looms large in the consideration of the Task Force on Organ Transplantation. They believe that organ donation is to be favored because it “promot[es] a sense of community through acts of generosity,” and they attach great “value [to] social practices that enhance and strengthen altruism and our sense of community.” TASK FORCE ON ORGAN TRANSPLANTATION, *ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS* 28 (quoting THE HASTINGS CTR., *ETHICAL, LEGAL AND POLICY ISSUES PERTAINING TO SOLID ORGAN PROCUREMENT: A REPORT OF THE PROJECT ON ORGAN TRANSPLANTATION* 2 (1985)) (internal quotation marks omitted).

First, this reduction is not a concern because transplant organs represent such a small portion of the occasions for charity. If charity should be completely driven from this sphere of life, its effect on the totality of charitable acts in society would be trivial. By permitting the sale of food, clothing, shelter, and medical care rather than insisting that they may only be transferred by charitable donation, we suffer the same loss of charity, and on an infinitely grander scale. We recognize in those cases, as we should in this, that the efficiency gains in terms of lives saved and suffering ameliorated is worth the marginal sacrifice of a sense of living in an altruistic community.

Second, even if we accept the notion that organ donation should be encouraged because charity in all its forms is a good thing, it hardly follows that sale should be prohibited. Permitting sale does not mandate sale. Charitable donation of organs not only remains possible, it becomes more noble when sale is permitted. Prohibiting sale only encourages donation to the extent that it diminishes donation's character. It is hardly an act of great generosity to donate that which you cannot use and may not sell.

Third, it is incorrect to treat sale and charity as mutually exclusive categories. It is a specious canard to suggest that if one accepts payment for one's goods or services that one is not also motivated by generosity and sympathy towards the recipient. After all, should we assume that merely because physicians are paid for their services that they feel no sympathy or compassion towards their patients?

Fourth, it must be remembered that the options market I propose must fundamentally rest on a spirit of charity, albeit generally one that begins at home. The seller of the option under my regime will get no direct personal benefit. The organ provider is really giving two separate gifts—one to the recipient of the organ and one to the recipient of the money. All financial benefit will accrue to his or her designee. Most often I suspect this will be his or her family. Is uncompensated generosity towards one's family such a knavish motive that it carries no weight?

I have left the most telling argument against commodification for last. In a sense, it is no argument at all. I simply present to you, the reader, the implication of giving sufficient weight to commodification such that it carries the day against a market. To believe that the argument prevails, you must hold that it is morally preferable because it celebrates "the intrinsic, ineliminable, ineluctable value of human life

and health”<sup>18</sup> when a twelve-year-old girl dies from renal failure rather than lives when a market provides a life-saving organ.

The evil is not that innocent people are dying to uphold a principle. Indeed, it is only for principles that people should be compelled to die. For example, I expect that virtually all readers believe it would be immoral to forcibly take the kidney of a healthy person to save that twelve-year-old girl. The failing of the anticommodification position is not that it is a moral argument, but rather that it is a perverse moral argument. What leap of moral logic provides that condemning innocents to death affirms the preciousness and sacredness of human life and that saving life through market transactions degrades life?

Those who present the anticommodification argument will often pair it with an assertion that an organ market will not provide more organs (a proposition I discussed and dismissed above). But if a necessary condition for those who adhere to anticommodification is that there be no price to pay for the lives saved and health restored, then, at least as far as the policy debate is concerned, anticommodification is completely superfluous to the argument. The only interesting question is whether a good reason exists not to employ or permit a market if it will save lives.

These are not and never were mere word games. What are to some occasions for posturing moralists to cut a fine figure of deep, enlightened, and caring people, are to others quite literally matters of life and death. The arguments made against employing market incentives to increase the supply of organs are nothing more than flatulent nonsense. It is not the market that offends human dignity, but rather the fanatical unwillingness to make use of the market to harness self-interest in the cause of saving the lives of thousands of people who are dying for want of organs that is a great offense to human dignity.

I would not be so harsh and unguarded in my assessment were it not that the effect of this anticommodification nonsense is so pernicious. Ideas have consequences, even—perhaps especially—very bad ideas. They affect public policy. Anticommodification lies at the base of the legal prohibition of an organ market. Those who voice these noble sounding sentiments intimidate many into silence and thereby condemn the innocent to death.

## VII. WHERE DO WE GO FROM HERE?

What is your response to my *Directions for the Disposition of My Vital Organs*? You might be inclined to dismiss them as the ravings of

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18. Freedman, *supra* note 14, at 23.

a strange and dark mind. But that will not do. Whether I am perverse does not affect the moral and political burden I have placed on you. You may think I do not have a good reason for withholding my organs, but that is of no moment. I may withhold my organs for a good reason, a bad reason, or no reason. Indeed, I write this because thousands of people go to their graves each year with organs that could return others to health, and because they do so for no reason that they (or you) consider very important.

I ask you not to think of this as some abstract question, but instead to imagine that later today you (or perhaps your child) feel a twinge in your lower back, or shortness of breath, or abdominal pain and fatigue. This time it is not mere muscle strain or influenza—this time it is the first sign of the failing organ. It is the beginning of the end, an end that can only be forestalled by the transplantation of a healthy replacement organ. So here is the question—are you willing to pay me \$864.27 for an organ to save your daughter's life? Do not look for an easy out. Do not imagine that she will get an organ from another source because any organ she receives comes at someone else's expense.<sup>19</sup> Your problem will have merely shifted to another parent of another girl who will now die for want of an organ. So are you willing to pay me or not? Unless you are the most unfeeling fanatic, you will answer in an instantaneous affirmative. Now the next question is, do you feel the slightest sense of moral guilt at having paid an additional \$864.27 to the supplier of the single irreplaceable input in the restoration of your child to health beyond the many tens of thousands of dollars that were paid to the surgeons, nurses, hospitals, drug manufacturers, equipment vendors, and patent holders?

These questions are too easy—maybe we can make them more difficult. I have just given you and your child a reprieve. To your great relief, it is just a muscle strain. Are you now relieved? But there is another parent out there with a dying child. Do you believe that by barring this commercial transaction and thereby condemning that child to death, you are recognizing and expressing “the intrinsic ineliminable, ineluctable value of human life and health”?<sup>20</sup> Because life is precious, indeed priceless, and we must reinforce that shared understanding, it is necessary that we enforce a prohibition on the sale of

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19. Currently, more than half the people in America who need a transplant die before they get one. *Assessing Initiatives to Increase Organ Donations: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 108th Cong. (2003) (statement of Robert Metzger, M.D., President-Elect, UNOS), available at <http://energycommerce.house.gov/108/Hearings/06032003hearing946/Metzger1498.htm>.

20. Freedman, *supra* note 14, at 23.

organs. To do otherwise profanes life itself. I am sure that will be a great comfort to the parents of the twelve-year-old girl dying of end-stage liver disease.

So I offer these *Directions for the Disposition of My Vital Organs* to make the costs of the legal prohibition real, clear, and unambiguous. They are my organs. If I die in appropriate circumstances, they could restore four or five people to health, but only if my estate is paid. I call on others to join me in making and publicizing similar statements. Put them on websites. Recruit your friends and colleagues. My goal is to expose evil and generate the political will to change the law to permit compensation for organ donation. The only way that we can escape the current lunacy is by making its price apparent to all. I do not take this path as a first resort, but as a last resort. Had I been more prescient and courageous I would have done this fifteen years ago and perhaps generated the political energy to have long since changed public policy. It is fifteen years of frustration and the final recognition that our opponents can not be swayed by reason that leads me down this path. Please join me.

